Tri-Messine Construction Company, Inc. and its alter ego Callahan Paving Corp. *and* Construction Council Local 175, UWUA, AFL–CIO *and* Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL–CIO, Party in Interest.
Cases 29–CA–194470 and 29–CA–206246

December 16, 2019

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On December 17, 2018, Administrative Law Judge Jeffrey P. Gardner issued the attached decision. The Respondent filed exceptions with a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the judge's recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondents, Tri-Messine Construction Company, Inc. and its alter ego Callahan Paving Corp., Brooklyn, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to apply the terms of the collective-bargaining agreement that Respondents entered into with Construction Council Local 175, Utility Workers Union of America, AFL–CIO (the Union) and failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of their bargaining unit employees.

(b) Recognizing Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL–CIO as the

[1] Chairman Ring took no part in the consideration of this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We find it unnecessary to rely on the judge's statement that it was "unproven" that the Respondent could not continue to perform the Con Ed work with Tri-Messine.

The judge also stated that "the Board does not recognize a company's financial challenges as justification for ignoring its existing collective bargaining relationships or agreements and forming a new entity." To the extent this statement suggests that an employer's financial challenges are wholly irrelevant when determining whether a decision is subject to bargaining, we disagree. See, e.g., *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 677–679 (1981); *Oklahoma Fixture*, 314 NLRB 958, 959-960 (1994), enf. denied on other grounds 79 F.3d 1030 (10th Cir. 1996); *Dubuque Packing Co.*, 303 NLRB 386, 391–392 & fn. 13 (1991), enfd. in relevant part sub nom. *United Food & Commercial Workers Local 150–A v. NLRB,* 1 F.3d 24 (D.C. Cir. 1993), cert. dismissed 511 U.S. 1138 (1994). We nevertheless reject the Respondents' argument, based on *First National Maintenance Corp.*, supra, that the decision to subcontract work to Callahan was a core entrepreneurial decision not amenable to the collective-bargaining process. Our decision is not based on subcontracting principles, but on the judge finding the Respondents to be alter egos, which are essentially the same entity and thus cannot be engaged in subcontracting. See, e.g., *Haley & Haley, Inc.,* 289 NLRB 649, 652 (1988) (finding it inappropriate to analyze conduct of alter egos under *First National Maintenance*), enfd. 880 F.2d 1147 (9th Cir. 1989).

We find that here bargaining was still possible, and the Respondent was obligated to continue recognizing its employees' chosen representative. We reject the Respondent's arguments it claims were not addressed by the judge. The Respondent's argument that it terminated the contract fails because it remained in a Sec. 9(a) relationship with the Union; thus, it was obligated to recognize the Union even after the contract expired. The Respondent's argument that it was authorized to not use Local 175 labor as per the "qualified" employee language in the collective-bargaining agreement fails because the record is clear that the language referred to the skill of the employees as opposed to their union affiliation, and, in any event, the Respondent stopped recognizing the Union altogether. Finally, the Respondent's argument that it was authorized to act pursuant to the doctrine of impossibility fails because, as indicated above and in the judge's decision, bargaining was still possible.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

In adopting the judge's finding that Respondents Tri-Messine Construction Co., Inc. and Callahan Paving Corp. were and are alter egos, Members Kaplan and Emanuel find it unnecessary to rely on the judge's statement that intent to evade the Act is not an essential component to an alter ego finding.

[3] Several of the Respondent's employees were discharged from Tri-Messine and did not immediately, or ever, continue working for Callahan Paving Corp. We therefore amend the remedy to provide that for any time those employees were not working for Callahan, backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). For the time employees were working for Callahan, backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). We also clarify that search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Employees shall be compensated for reasonable search-for-work and interim employment expenses in accordance with *King Soopers, Inc.,* 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), regardless of whether those expenses exceed interim earnings.

We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997) (holding that the contingent notice-mailing date in the order's notice-posting paragraph should correspond with the date of the first unfair labor practice). We shall substitute a new notice to conform to the Order as modified.

collective-bargaining representative of their bargaining unit employees.

(c) Discharging or otherwise discriminating against any employee for supporting the Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Honor and abide by the terms and conditions of their collective-bargaining agreement with the Union and make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of their unfair labor practices in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(b) Within 14 days from the date of the Board's Order, offer all affected employees, full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make those employees who were not able to immediately continue working for Callahan Paving Corp. whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, plus reasonable search-for-work and interim employment expenses, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Make those employees who continued working for Callahan Paving Corp. whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to recognize and bargain with the Union, plus interest, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(e) Make whole their employees for any expenses ensuing from the Respondents' failure to make required contributions to the Union's benefit funds and make whole the Union's benefit funds for losses suffered, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(g) Within 14 days from the date of this Order, remove from their files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of monies due under the terms of this Order.

(i) Within 14 days after service by the Region, post at all of their facilities copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all employees and former employees employed by Respondents at any time since March 3, 2017.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. December 16, 2019

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Construction Council Local 175, Utility Workers Union of America (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit by refusing to apply the terms and conditions of our collective-bargaining agreement, including wage rates and benefit fund contributions.

WE WILL NOT recognize Highway, Road and Street Construction Laborers Local 1010, LIUNA, AFL–CIO as the collective-bargaining representative of our bargaining unit employees.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Construction Council Local 175, UWUA, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL honor and abide by the terms of our collective-bargaining agreement with the Union, and WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of our refusal to apply the collective-bargaining agreement to all unit employees, plus interest.

WE WILL, within 14 days from the date of this Order, offer affected employees, full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make those employees who were not able to immediately continue working for Callahan Paving Corp. whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL make those employees who continued working for Callahan Paving Corp. whole for any loss of earnings and other benefits suffered as a result of our unlawful refusal to recognize and bargain with the Union, plus interest.

WE WILL make all delinquent payments to the Union's benefit funds and WE WILL make you whole for any expenses ensuing from our failure to make such payments, including any additional amounts due to the funds on your behalf, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the affected employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

TRI-MESSINE CONSTRUCTION COMPANY, INC. AND CALLAHAN PAVING CORP., ALTER EGOS

The Board's decision can be found at www.nlrb.gov/case/29-CA-194470 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Emily A. Cabrera, Esq. and *Francisco Guzman, Esq.,* for the General Counsel.

Mark N. Reinharz, Esq., for Tri-Messine Construction Company,

Inc. and Callahan Paving Corp.[1]
Eric Chaiken, Esq., for the Charging Party.
Barbara S. Mehlsack, Esq., for the Party in Interest.

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. This case was tried in Brooklyn, New York, on consecutive days beginning on April 10, 2018 and ending on April 12, 2018. The complaint alleges that the Respondents (Tri-Messine and Callahan)[2] are alter egos of each other and that these entities violated Sections 8(a)(5) and (1) and 8(d) of the Act by failing and refusing to recognize the Charging Party Union, Local 175 (hereafter the Union), on and after March 3, 2017, as the collective-bargaining representative of its employees engaged in bargaining unit work; and repudiating and refusing to apply the applicable Tri-Messine collective-bargaining agreement (CBA) to the bargaining unit employees.

In addition, the General Counsel argues that Respondents violated Section 8(a)(2) of the Act by recognizing and signing a contract with the Party in Interest (hereinafter "Local 1010") while it was still obligated to recognize and bargain with the Union.

The complaint further alleges that Tri-Messine violated Section 8(a)(3) of the Act by terminating all of its Local 175 affiliated workers, and that it violated Section 8(a)(5) by failing to notify and bargain with the Union over the decision and effects of the terminations.

In its answer, Respondent denied the essential allegations of the complaint, and raised an affirmative defense that the 8(a)(2) and (3) charges are time-barred under Section 10(b) of the Act.[3] After the trial, the General Counsel, Respondent and Local 1010 each filed briefs, all of which I have read and considered.[4] Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent and both of its individual entities have been engaged in operating asphalt paving businesses with locations in the State of New York. They admit and stipulate to the Board's jurisdiction, including that they are engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent does not deny that the Union is a labor organization within the meaning of Section 2(5) of the Act and did not object to the General Counsel's amendment of the Union's name to reflect that it had affiliated with a new national union. (See GC Exh. 3; Tr. 14.)[5] As such, I find that the Union is a labor organization.

II. ALLEGED UNFAIR LABOR PRACTICES

The Facts

The General Counsel and Respondent stipulated to certain facts underlying this charge (GC Exh. 2), and I find as fact all those matters to which those parties stipulated. The two employer entities at issue in this case, Tri-Messine and Callahan, are exclusively owned by members of the Messina family: Tri-Messine is 100 percent owned by Alfonso "Al" Messina Sr. and Callahan is 100 percent owned by Patricia Messina, his wife.[6]

Also testifying at the hearing were former Tri-Messine employee Frank Wolfe, the Union's attorney, Eric Chaikin, the Union's fund manager, Anthony Franco, Consolidated Edison ("ConEd") Section Manager Michael Perrino, and Callahan (and former Tri-Messine) employee Andrew Cinquemani.

Respondents' Common Ownership, Control, Management

Supervision, Business Purpose, Customers and Equipment

Tri-Messine was established by Messina's father and two brothers in 1966 and has been performing asphalt paving work in the construction industry since then. Thereafter, Messina's uncles left the business, and eventually Messina took over sole ownership of the business from his father in 1977. Callahan was not incorporated until November 14, 2016. It performs the exact same asphalt paving work in the construction industry. Both Tri-Messine and Callahan conduct their business operations throughout New York City and Long Island, New York.

All of Tri-Messine's operations, including customer relations and labor relations, are managed by Messina, in his role as president of the company. Tri-Messine has no other managers or directors besides Messina. Messina also manages all operations, including customer relations and labor relations, for Callahan, with some assistance from Supervisor Andrew Cinquemani, who reports directly to Messina.[7] Callahan has no other managers or directors, including Patricia, who despite being its sole owner, is

[1] Since this matter was initiated, the Union has affiliated with a new national union, and its new name, as amended at the opening of the hearing, is Construction Council 175, Utility Workers Union of America, AFL–CIO. For purposes of this decision, I will refer to it as "Local 175" or "the Union."

[2] Hereinafter, Respondents will be separately identified as Tri-Messine and Callahan, except I will sometimes collectively refer to them in the singular as Respondent, where appropriate.

[3] In its answer, Respondent also included an affirmative defense (among a litany of "Defenses & Affirmative Defenses" which mostly reiterate its denials of the Complaint's substantive allegations) asserting that the Union waived its right to bargain over the changes in employees' terms and conditions of employment, allegedly barring relief. Local 1010 joined in that argument as well. As I found no credible evidence of a clear waiver on the part of the Union here, I am dismissing that defense.

[4] Charging Party did not file a separate brief.

[5] Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits, "CP Exh." for the Charging Party's exhibits, and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included only where appropriate to aid review and are not necessarily exclusive or exhaustive.

[6] "Callahan" is Patricia Messina's maiden name. Al Messina testified at the hearing, though Patricia Messina did not. For the sake of clarity, I will refer to Al Messina as "Messina" and Patricia Messina as "Patricia."

[7] Cinquemani had been a laborer and then a foreman at Tri-Messine, and began as a foreman at Callahan on March 6, 2017. He was later promoted to supervisor in September 2017. There is no indication Cinquemani shared any supervisory or managerial role at Callahan prior to that September 2017 promotion.

not involved in any customer relations or labor relations for Callahan, and is not involved in any aspect of its day-to-day operations or supervision.

Messina has the exclusive authority to hire, fire, discipline, grant time off, assign work, and create all work schedules for Tri-Messine, and Tri-Messine has no supervisors other than Messina. At all times since its creation, Messina has had the same exclusive authority to hire, fire, discipline, grant time off, assign work, and create all work schedules at Callahan. Beginning in September 2017, Cinquemani became a supervisor at Callahan, and has had the authority only to effectively recommend to Messina the hiring, firing, discipline, time off, work assignments and schedules of Callahan employees.

Tri-Messine and Callahan both operate their businesses out of an office located at 6851 Jericho Turnpike, Suite 240, Syosset, New York, share the same physical office space there, and use the same office equipment, including copy machines and computers. Callahan reportedly pays some amount of rent to Tri-Messine for use of the space, which includes the cost of utilities, though Messina did not know how much Callahan pays. Callahan and Tri-Messine pay separate telephone and cable bills.

Tri-Messine is bonded and insured to perform asphalt paving work by Berkley and Travelers Insurance Companies, and Callahan is bonded and insured to perform that same work under Tri-Messine's policies. Although Tri-Messine and Callahan both use CitiBank for all banking and other financial needs in connection with their business operations, they maintain separate bank accounts, and also have separate workers' compensation insurance policies.

Tri-Messine owns a fleet of heavy equipment, including trucks and other vehicles used to perform asphalt paving work, which it stores at two yards located in Flushing, NY and Bronx, NY. Callahan uses the very same Tri-Messine-owned heavy equipment to perform asphalt paving work, stored at the same yards, but does not compensate Tri-Messine for the use of this equipment or for its storage.

Tri-Messine purchases the asphalt used in its operations from Willetts Point Asphalt, Flushing Asphalt, and RCA Paterno, and purchases its concrete from Lehigh Hanson and CNB Construction. Tri-Messine provides to Callahan all of the asphalt and concrete used in Callahan's operations, without cost to Callahan.

From 1984 to the present, Tri-Messine has had a contract to perform asphalt paving work for ConEd. Since March 6, 2017, Tri-Messine has subcontracted that ConEd work entirely to Callahan. In or about September 2017, Tri-Messine also secured a contract to perform work for National Grid, and on September 20, 2017, it also subcontracted that National Grid work entirely to Callahan. Tri-Messine has also contracted with various other entities for smaller jobs, which it performed until March 2017, but thereafter subcontracted to Callahan to perform.

Since March 6, 2017, Tri-Messine no longer performs any actual paving work, but rather, Callahan performs all of the work pursuant to the March 6, 2017 Subcontractor Agreement between the two entities. (GC Exh. 14). Indeed, all the work Callahan performs is received from Tri-Messine pursuant to that subcontracting agreement. Callahan does not have any outside contracts of its own.

Tri-Messine's Relationship with Local 175

In 2009, Local 175 petitioned for, and the NLRB conducted, an election among the employees of Tri-Messine to determine whether they wished to be represented for purposes of collective bargaining by Local 175. The Union won the election, held on April 23, 2009, and thereafter was certified by the Board as the collective bargaining representative of Tri-Messine's employees on June 16, 2009.

On June 9, 2009, Messina signed a Paving Division Assumption Agreement between Tri-Messine and Local 175, which recognized Local 175 as the employees' majority representative under Section 9(a) of the Act, and which bound Tri-Messine to the terms of the Alliance Collective Bargaining Agreement which had been negotiated between the Union and the New York Independent Contractors' Alliance.

Thereafter, Tri-Messine entered into successive CBAs with Local 175, the most recent of which was scheduled to run from July 15, 2014 to June 30, 2017. It is undisputed that Tri-Messine had acknowledged the Union's representation of its employees, and had been honoring the terms of the parties' CBA until the events at issue in this case.

By letter dated February 28, 2017, Tri-Messine notified the Union that "Local 175 does not meet the qualifications to perform the Consolidated Edison work." (GC Exh. 17-a). Thereafter, by letter dated March 13, 2017, Tri-Messine advised the Union that it was terminating the contract, as provided for by its terms, effective June 30, 2017. Tri-Messine had earlier provided notice to terminate its NYICA agreement as well.

Tri-Messine ceased making Local 175 welfare, pension, annuity and training fund contributions in or about March 2017, as soon as it stopped using Local 175 employees to perform work.

The Con Ed Contract

Tri-Messine's largest customer by far was Con Ed, from which Tri-Messine historically obtained in the range of 90% of its revenue. Tri-Messine had been performing work for Con Ed for many years without any apparent incident, and with Local 175 members performing the work. Tri-Messine is one of multiple Con Ed contractors who perform services pursuant to the "Consolidated Edison Company of New York, Inc. Standard Terms and Conditions for Construction Contracts" (hereinafter "STCC") (GC Exh. 8).

In October 2014, Con Ed amended a portion of its STCC to require, "unless otherwise agreed," that contractors performing work for them have a collective bargaining agreement with a union that belonged to the Building & Construction Trades Council of Greater New York ("BCTC"). Local 175 was not a member of the BCTC at that time, and despite efforts to become a member through new affiliations or otherwise, continues not to be a member. In fact, the only union that appears to belong to the BCTC whose members perform asphalt paving work is Local 1010.

Messina testified that beginning as early as the Fall of 2015, he was hearing from Con Ed representatives that the STCC restriction was going to start being enforced. The subject came up during negotiations with Con Ed for a renewal of Tri-Messine's contract as well as during a pre-bid meeting with other contractors present. Messina testified that he believed that Con Ed was

ready to enforce the provision, and at some point would not continue giving Tri-Messine the work unless it had an agreement with a BCTC union. Tri-Messine shared this information with the Union, and the Union advised Messina of its ongoing efforts to become a BCTC union, or otherwise overcome the STCC restriction.[8]

Notwithstanding this amendment to Con Ed's STCC, and notwithstanding the Union's not being a member of the BCTC, Tri-Messine nevertheless was able to continue performing Con Ed work unabated with its Local 175 represented workforce through the remainder of 2014, the entirety of 2015 and 2016, and the beginning of 2017, until Callahan began performing the work. No evidence was presented that Local 175 workers were ever turned away from a Con Ed worksite because of their union affiliation.

Indeed, at least as late as March 2017, Tri-Messine was still performing work for Con Ed while its employees were still represented by Local 175, and while it was still bound by an existing CBA with the Union that was in effect through June 30, 2017.

Callahan Paving Corp. is Formed and Recognizes Local 1010

Meanwhile, on November 14, 2016, Callahan Paving Corp. was formed, with Patricia as its sole owner. Respondent does not deny that it was Messina whose idea it was to form Callahan, that Messina played an active role in initiating its creation, and that Callahan was established solely for the purpose of performing subcontracted Tri-Messine work.

Respondent stipulated that among the personal assets Patricia used to fund the creation and operation of Callahan were assets she co-owns with her husband. Notably, during the final payroll period of 2016, shortly after Callahan was created but before it commenced operations, Patricia received an "officer's bonus" of one million dollars from Tri-Messine, even though she was not an officer of that company.

Callahan had no employees when it was initially created, and Messina readily acknowledged that it never would have hired employees (or existed at all) other than to perform Con Ed work with a BCTC union, which meant other than Local 175. Callahan still had not yet commenced operations or hired any employees when on January 13, 2017, it entered into a collective bargaining agreement with Local 1010, which Patricia signed. Negotiations for that CBA began as early as December of 2016, and followed what had initially been an attempt by Messina to negotiate directly with Local 1010 on behalf of Tri-Messine, which Local 1010 rejected.

At the time Callahan signed its CBA with Local 1010, the Union remained unaware of the creation of Callahan, and unaware that both Tri-Messine and Callahan had been negotiating with Local 1010 for recognition and a contract. This was despite the fact that the subject of Con Ed's STCC was one that Messina and the Union had spoken of on multiple occasions over the prior year or more. It was not until after Callahan signed its Local 1010 CBA that Messina finally advised the Union of Callahan's existence, and that Tri-Messine was soon going to be laying off employees.

Prior to the actual signing of the Local 1010 CBA, there were only rumors that Tri-Messine was creating an alter ego and dealing with Local 1010, and in early January 2017, the Union's attorney had requested to meet with Respondent's counsel to discuss those rumors. Though the attorneys agreed to meet on January 13, 2017, the same day Callahan signed the Local 1010 CBA, that meeting never took place, as the parties met instead without counsel the following week.

On or about January 18, 2017, Messina met with Union fund manager Anthony Franco at a local diner. Although Franco is not officially a union representative, he had participated in many prior conversations with Messina and the Union business agent and was present on behalf of the Union business agent on this occasion. Messina advised Franco at this meeting that Callahan had been created, and that it had already signed a CBA with Local 1010. Franco testified that he did not request to bargain at that time, in part because the Union already had a contract that was still in effect, and in part because this new entity had already signed a contract with Local 1010.

At about the same time, Messina held a meeting with all of Tri-Messine's employees at the Flushing truck yard. At that yard meeting, Messina informed the employees, with Local 175 representatives present that Tri-Messine was no longer going to be able to use Local 175 members to perform work. He told them there would be a new company that would be performing the work with a different union, Local 1010. Messina further advised the employees that he was going to have to let them all go, but that he would try his best to keep as many of them working as possible with the new company.

The employees continued working for Tri-Messine until Friday, March 3, 2017, when Messina came to the Flushing yard for another meeting and advised them all that it was their last day of employment. He also told them that he would meet individually with each of them to see if there was a way they could join a union other than Local 175 in order to be able to work for Callahan. The Union representatives present also told the employees that they would try to assist those members who were unable to work with the new company find work elsewhere. That was the last day on Tri-Messine's payroll for all forty-four of its Local 175 employees.

Notably, the Local 1010 CBA with Callahan required that Callahan hire its paving employees exclusively through the Local 1010 hiring hall. Local 1010 would not permit Callahan to simply hire Tri-Messine's existing workers by having them change their affiliation. However, this restriction appears to have applied only to Local 175 members with no other affiliation. For Tri-Messine employees who also held membership in Local 282 Teamsters Union or Local 15 Operating Engineers Union (or who had the qualifications to join one or the other of those unions, with which both Tri-Messine and Callahan had signed contracts) Messina was apparently able to by-pass the Local 1010 hiring hall requirement and have Callahan hire those employees directly as members of Local 282 or Local 15.

[8] The Union does not dispute that it was aware of the STCC restriction and that it was actively exploring various ways, including through litigation, to overcome or invalidate that restriction.

Callahan did in fact hire 16 of those 44 employees to begin working on the very next business day, its first day of operations, Monday, March 6, 2017, as members of either Local 282 or Local 15. Three more former Local 175 Tri-Messine employees – 2 foremen and a yard worker—were also hired to begin working for Callahan on its first day of business.[9] As many as fourteen more former Local 175 members were hired by Callahan, primarily through the Local 1010 hiring hall, over the course of the ensuing months. Only nine of the former Tri-Messine employees were never offered employment by Callahan.

On March 6, 2017, Messina and Patricia executed a "Subcontractor Agreement" on behalf of Tri-Messine and Callahan, respectively, whereupon Callahan immediately began performing the work from Tri-Messine's contract with Con Ed, only now using a workforce consisting of those former Tri-Messine employees who were able to be hired by Callahan, along with some new employees from the Local 1010 hiring hall. On March 17, 2017, Callahan and Local 1010 signed an Acknowledgement of Recognition form based on a card check of 21 employees, the number which that form identified as the total number employed by Callahan covered by the Local 1010 CBA.[10]

The Union was neither informed of nor bargained with over the decision to subcontract all of Tri-Messine's work. Messina acknowledged that he intentionally held off on notifying the Union of this until the February 28, 2017 letter in which Tri-Messine characterized Local 175 members as no longer being qualified to perform the work. Prior to that, although aware of Callahan's creationfrom Messina's conversation with Franco, the Union did not know of Tri-Messine's plans to lay off all of its employees.

In April 2017, the Union requested to bargain for a successor contract to the CBA that was expiring on June 30, 2017, and which Tri-Messine had earlier advised it was not renewing. Tri-Messine responded by indicating it was agreeable to meet to discuss concerns regarding the existing agreement but reiterated what it had advised the Union in its March 13, 2017 letter, that it was terminating the parties' contract, and did not intend to renew. The parties never did meet for bargaining.

Credibility

Many of the above factual findings are based on stipulated facts, uncontradicted testimony, authenticated documentary evidence and testimony against interest by Messina, which amount to admissions. To the extent that Messina gave arguably exculpatory testimony for his actions, I found his credibility to be mixed. He essentially admitted that he controls both Tri-Messine and Callahan, testimony against interest that I find credible. He also testified credibly regarding his relationships with employees, and his concern for their well-being appeared genuine and was corroborated by some of his actions. However, he repeatedly returned to the thrust of Respondent's argument that he had no choice but to take the actions he did, and he appeared defensive and evasive in support of this argument.

I found the Union's fund manager Anthony Franco's credibility to be similarly mixed. While his interests are unofficially aligned with the charging party, he was straightforward in acknowledging his personal affinity and respect for Messina. While he appeared to me to be testifying truthfully, his memory of details was often more general than specific. He was credible and matter-of-fact when relating Messina's delivery of the news about Callahan as a done deal.

I found Local 175 member Wolfe and attorney Chaikin to be credible witnesses. Though their interests were obviously aligned with the charging party, I found both of their demeanors to be honest and straightforward. In particular, I found Chaikin's testimony regarding what he and the Union knew and when they knew about the creation of Callahan and the decision to lay off employees and subcontract all of Tri-Messine's work to be both consistent and persuasive.

Consolidated Edison ("ConEd") Section Manager Michael Perrino testified briefly, pursuant to the Charging Party's subpoena. Although he was somewhat defensive on the witness stand, and appeared reluctant to be participating in the process, I believe he was testifying truthfully to the best of his ability as to the limited scope of his knowledge. He was equivocal when it came to the specifics of whether Tri-Messine could have continued performing Con Ed work with its existing employees – standing by the STCC language on the one hand, but acknowledging that Con Ed had never actually enforced it and never directed Tri-Messine to lay off employees.

Callahan (and former Tri-Messine) employee Andrew Cinquemani also testified only briefly, primarily about his own unique experience transitioning from Tri-Messine to Callahan. I found him to be generally credible, in particular when testifying about what he witnessed at the March 3, 2017 meeting with employees. He was very clear and forthright in his description of the way Messina presented the situation to employees, effectively as a fait accompli, and his further description of Messina's proactive role in working to have Callahan hire Tri-Messine's employees.

Analysis

The Supreme Court has long-recognized that the operation of a prior enterprise under a different name can, in certain circumstances, constitute a "disguised continuance" binding the new company to the old company's obligations under the Act. *Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942). In determining whether an enterprise is a "disguised continuance" or "alter ego" of another business, the Board examines whether the entities share substantially identical management, business purpose, operation, equipment, customers and supervision.

Other significant factors include common ownership or control, lack of arm's length dealings between the two entities and whether one entity was formed or used to avoid union obligations under the Act. No one factor is controlling and not all the indicia need be present to find an alter ego relationship. *Kenmore Contracting Co*., 289 NLRB 336, 337 (1988), enfd. 888 F.2d 125 (2d Cir. 1989), and cases there cited. See also *U.S. Reinforcing,*

[9] In addition, Tri-Messine's longtime administrative assistant joined Callahan's payroll on March 6, 2017, but spent her first week of employment with Callahan on a paid vacation, presumably earned during her time at Tri-Messine, though paid by Callahan.

[10] Curiously, this number did not include the former Tri-Messine employees who had begun working for Callahan on March 6, 2017 by way of their Local 282 and Local 15 memberships.

Inc., 350 NLRB 404, 404–405 (2007).

Moreover, and significantly for this case, strict common ownership is not a necessary requirement if there is a family relationship that shows common control. Indeed, the Board has found substantially identical ownership and an alter ego relationship in the absence of strict common where the original entity and the newly formed entity are wholly owned by members of the same family, including as here husband and wife. *Alexander Painting, Inc*., 344 NLRB 1346, 1353 (2005); *Fallon Williams*, 336 NLRB 602, 603 (2001); *AC Electric*, 333 NLRB 987, 1001 (2001). The facts of this case overwhelmingly support that same finding.

The Board developed its alter-ego doctrine precisely in order "to prevent employers from evading obligations under the Act merely by changing or altering their corporate form." *NLRB v. Allcoast Transfer, Inc*., 780 F.2d 576, 579 (6th Cir. 1986). And because an alter ego is considered the same enterprise as the related employer for purposes of the Act, the alter ego is bound by the collective-bargaining agreement between the related entity and its union. *Midwest Precision Heating & Cooling, Inc. v. NLRB*, 408 F.3d 450, 458 (8th Cir. 2005), and is responsible for the other entity's unfair labor practices. *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board.*, 417 U.S. 249, 259fn. 5 (1974).

A. Tri-Messine and Callahan Were and Are Alter Egos

1. Common ownership, management, and supervision

As an initial matter, although Patricia is undisputedly the sole owner of Callahan, I am not convinced that her separate "ownership" truly represents an arm's length business transaction. While she did not testify, Respondent stipulates that Patricia is not involved in the day-to-day operations of the business, has no role in customer relations or labor relations, and funded the business in part with assets she shares with her husband, who is undisputedly in charge of operations at both Tri-Messine and Callahan.

Taken together, these factors call into question whether the two entities really have two different owners. But, to whatever extent they do technically have two different owners, the family rationale used in *Alexander Painting, Fallon Williams* and *AC Electric* supports a finding that in fact, Tri-Messine and Callahan share substantially identical ownership.

There is also ample evidence that the Messina family exercised common control of both entities. While one entity is owned and controlled by Messina, the other is nominally owned by his wife Patricia, but fully controlled by Messina. Each also worked in essentially the same capacity for the other's company – Messina handling the operations for both entities, while Patricia worked in the office, with no apparent change in duties from one company to the other. This is not a situation where 2 business owners just happen to be married. Here, there is effectively only one person in charge of both entities.

Indeed, many of the facts that support a finding of alter ego are barely in dispute regarding Respondent's common management and supervision. The two entities admittedly shared substantially identical day-to-day management, with Messina providing the essential operational management and supervision of both companies, with assistance from Cinquemari at Callahan only since September 2017.

Thus, in these circumstances, it is not as significant that there is a technical difference in ownership of these two entities, one owned by a husband and one by his wife. Based on these facts, it is clear that Tri-Messine and Callahan had substantially identical ownership, management and supervision, all of which strongly support a finding of alter ego.

2. Same business purpose, operations and equipment

Moreover, the facts of this case conclusively show that Tri-Messine and Callahan share the same business purpose, operations and equipment. It is undisputed that both entities are primarily engaged in the business of providing asphalt paving services in New York City and Long Island, and perform that work for the exact same customers. Respondent stipulated that Tri-Messine has been subcontracting all of its work to Callahan, and that all of Callahan's work is that which is subcontracted from Tri-Messine.

In addition, the business relationship Tri-Messine had with ConEd continued seamlessly from Tri-Messine to Callahan, with the one very significant difference being that Tri-Messine had actually bid for the work and gone through the necessary and extremely detailed process to secure the ConEd contract. By contrast, Callahan essentially stepped in to replace Tri-Messine having undergone none of the ordinary and expected vetting that ConEd had clearly required of its contractors as indicated by the efforts Tri-Messine had to undergo to secure the contract work. The same was true with regard to National Grid and the other smaller contractors with which Tri-Messine developed relationships, only to entirely subcontract its work to Callahan.

At its inception, Callahan had no other customers besides those which had previously been Tri-Messine's customers, all of which became Callahan's own customers, even though technically "subcontracted" from Tri-Messine. And, from the outset and continuing to date, Callahan employed a large compliment of former employees of Tri-Messine for the new company, which was a result of Messina's personal efforts to arrange for Callahan to hire as many of Tri-Messine's employees as he possibly could within the constraints of Callahan's new CBA with Local 1010. As such, Callahan's operations were virtually unchanged from what had been Tri-Messine's.

With regard to their equipment, in addition to both entities performing the same type of work, both used not only the same type of equipment, but literally the same equipment. Respondent stipulates that Callahan uses Tri-Messine's equipment and yards without compensating Tri-Messine for that use. Callahan also obtains the asphalt needed to perform its business duties from Tri-Messine, which in turn continues to obtain the asphalt from its longtime supplier, but Callahan does not compensate Tri-Messine for the asphalt. Thus, the operations, equipment and business purposes of these two entities are effectively identical.

3. Lack of an arm's length relationship

In addition to these entities sharing common management, ownership, supervision, business purpose, operations and equipment, there is clear evidence of a lack of an arm's length relationship in the many transactions between the two companies, which is an additional factor to consider in making an alter ego determination.

For example, these two entities maintained the same office

and used the same office equipment, including copiers and computers for an undisclosed amount of rent, which also included utilities. Callahan uses Tri-Messine's equipment and storage yards without compensation, and obtains all of the asphalt used in its operations from Tri-Messine, also without compensation. Callahan also hired Tri-Messine's former administrative assistant, who was paid by Callahan for a week's vacation for her first week on Callahan's payroll, before ever working a day for Callahan.

Moreover, when Callahan began its operations, it would have needed capital investment, at the very least to pay for the office rent and labor. The parties stipulated that Patricia used certain assets for this purpose that were jointly owned with Messina. And, coincidentally, Patricia was granted a one million dollar "officer's bonus" by Tri-Messine just after Callahan was created, even though she was not an officer of Tri-Messine, and no evidence was presented that this was a typical bonus she received in the past.

None of these examples would be expected between two entities separated by arm's length, and I find instead that they collectively point to a lack of arm's length relationship between Tri-Messine and Callahan.

4. Intent to evade the Act

Finally, I find there is substantial evidence that Callahan was formed as a way to avoid Tri-Messine's agreements with the Union and thus the Act's bargaining requirements. Though arguing against such a finding, Respondent essentially admits as much. It's primary argument is that Callahan was established only to enable compliance with the Con Ed STCC language by changing the union that represented its employees.

Even accepting as true Respondent's contention that Callahan was formed only after Con Ed announced once and for all that it was no longer going to permit contractors to perform its work unless its employees were represented by a BCTC-affiliated union, I find that by definition means Callahan was formed to avoid dealing with the Union and to avoid bargaining obligations under the Act.[11]

Moreover, to whatever extent Respondent's motivation was instead seeking to avoid economic losses that might result from a potential inability to perform ConEd work, it was not privileged to unilaterally establish an alter ego, without notifying and bargaining with the Union over that in advance. The Board does not permit an employer to avoid its obligations under the Act even if facing a potential loss of customers.

Taking all these facts together, it is clear that Tri-Messine and Callahan share substantially identical management, business purpose, operation, equipment, customers and supervision – essentially every indicia of an alter ego. Moreover, these two entities also exhibit other factors including common control, lack of arm's length dealings between the two entities and what amounts to an admission that one entity was formed or used to replace the duly elected collective bargaining representative with a different union in violation of the Act.

B. Callahan Violated Section 8(a)(5) and (1) and 8(d) of the Act by Refusing to Bargain with the Union and by Failing to Apply the Collective Bargaining Agreement in Existence Between the Union and Tri-Messine

The Board has held that the collective-bargaining agreement of an employer applies to its alter ego, as of the date of the alter ego's first use of bargaining unit employees. *E. G. Sprinkler Corp.*, 268 NLRB 1241, 1241 fn.1 (1984). As such, because Callahan was and is the alter ego of Tri-Messine, it is subject not only to the bargaining obligations of Tri-Messine, but also to the continued application of the bargaining agreement binding Tri-Messine. See *E.G. Sprinkler,* cited above, 268 NLRB at 1244; *A.D. Connor, Inc.,* 357 NLRB 1770, 1785–1787 (2011); and *Midwest Precision Heating & Cooling, Inc.,* 341 NLRB 435, 440 (2004), enfd. 408 F.2d 450 (8th Cir. 2005).

It is undisputed that Callahan never recognized the Union as the representative of its employees and never applied the applicable Union agreement to the unit employees it employed, beginning with the commencement of its operations on March 6, 2017. Indeed, by the time its operations began, Callahan had already signed a collective bargaining agreement with another union, Local 1010. And, effective that same date, Tri-Messine ceased its own operations, redirected all of its paving work to Callahan, and ceased making the contractually required fund payments to the Local 175 funds.

Just a week later, Tri-Messine formally advised the Union in writing that it was terminating its CBA upon its expiration, and was not going to renew. To whatever extent Tri-Messine may have been nominally open to bargain over the effects of its actions, it is not disputed that Callahan, Tri-Messine's alter ego, had repudiated the Local 175 CBA and the collective bargaining relationship with Local 175, in violation of the Act.

I also find that Messina's announcement of Callahan's creation, its contract with Local 1010, and Tri-Messine's layoff of all its workers was delivered as a fait accompli, rendering useless any attempt to bargain over those decisions. This was true both with regard to Messina's conversation with Franco as well as his meetings with the employees in January and March.

C. Callahan Violated Section 8(a)(2) and (1) of the Act by Recognizing Local 1010

An incumbent union is the exclusive collective bargaining representative of the unit of employees it represents, and an employer that is under an agreement with an incumbent union may not grant recognition to a different union without violating Section 8(a)(2). *Advance Architectural Metals, Inc.*, 351 NLRB 1208, 1217 (2007). This prohibition also applies to the alter ego of the employer. *Citywide Service Corp.*, 317 NLRB 861 (1995).

Here, Callahan signed a collective bargaining agreement with Local 1010 as part of the establishment of its operations in January 2017, prior to even hiring any employees. Messina advised his Tri-Messine employees in January 2017 that in order to continue working, they would have to join Local 1010 and work for the new company he created. Later, in March 2017, Messina

[11] Regardless, intent to evade the Act is not an essential component to an alter ego finding. See *Johnstown Corp*., 313 NLRB 170, 171 (1993), remanded, sub. nom., *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3d Cir. 1994), and reaffirmed in 322 NLRB 818 (1997). It is merely one additional factor to be considered.

repeated to his Tri-Messine employees that they could no longer work unless they changed their union affiliation. And, indeed, at all times, Callahan required employees to join Local 1010, or another non-Local 175 union, in order to work.

Because my findings show that Tri-Messine and Callahan were and are alter egos, the Union's prior bargaining agreement with Tri-Messine remains valid and continues to apply to Callahan's bargaining unit employees. It follows that Callahan, as the alter ego of Tri-Messine, was required to recognize Local 175, and Respondents violated the Act when Callahan instead recognized Local 1010 as the collective bargaining representative of its employees.

D. Tri-Messine Violated Section 8(a)(3) and (1) of the Act by Terminating all of its Employees because of their Membership in Local 175

Section 8(a)(3) of the Act prohibits an employer from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. Here, the fact that Tri-Messine terminated all 44 of its Local 175 affiliated employees on March 3, 2017, is not in dispute. And the fact that it was their Local 175 affiliation that resulted in their terminations cannot seriously be disputed.

Indeed, the fact that so many of the terminated employees were either immediately or subsequently hired by Callahan upon affiliating with a different union demonstrates beyond a doubt that Respondent's conduct had as its primary purpose and result the discouraging of membership in Local 175.

As with all of the allegations in the complaint, Respondent's defense here is that they had no choice but to terminate these employees. Respondent argues that the reason the employees were terminated was not because of any ill will toward the Union, but because Con Ed would not permit Local 175 members to perform their work. However, just as I am not persuaded by this argument to absolve Respondent of its Section 8(a)(5) and 8(a)(2) violations, I do not find that it excuses conduct that plainly violated Section 8(a)(3).

However constrained Messina may have felt about his available options, the facts are what they are. I find that Tri-Messine terminated its employees solely because of their membership in Local 175, and that but for that union membership, they would not have been terminated. As such, the only available conclusion is that those terminations violated Section 8(a)(3) and (1) of the Act.

E. Respondents' Arguments for why the Alter-Ego Doctrine Should Not Apply to Tri-Messine and Callahan Fall Short

Respondent does not argue that the facts here would support a finding that the two entities are sufficiently separate so as to preclude a finding of alter ego. Rather, Respondent relies solely on what it views as equitable arguments for not applying the alter ego doctrine. I do not find any of these persuasive.

Respondent argues that Tri-Messine and Callahan cannot be alter egos or single employers because the Con Ed work could not continue to be performed by Tri-Messine. As an initial matter, that factual assertion is unproven. The alleged impediment to continuing to perform Con Ed work was the STCC restriction, which Con Ed had failed to enforce for the over two years since the STCC was amended in 2014, and still was not enforcing at the time Messina and Patricia unilaterally created Callahan, nor through the beginning of 2017 when Tri-Messine was continuing to perform Con Ed work with Local 175 members.

Moreover, it is irrelevant to the determination. Whatever the reasons for the unilateral creation of Callahan – and it cannot be denied that Messina was facing a difficult situation with competing demands from various sides - this is nevertheless exactly the type of disguised continuance of a previously operating business that the alter ego analysis is designed to prevent. While I can appreciate the challenge that ConEd's STCC threatened to present to Tri-Messine's business, the Board does not recognize a company's financial challenges as justification for ignoring its existing collective-bargaining relationships or agreements and forming a new entity. See *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 (2016), enfd. 892 F.3d 362, 374 (2018).

Respondent further argues that there was no attempt by Tri-Messine to disguise the subcontracting of work to Callahan, and therefore, no alter ego finding should be made. As an initial matter, no one factor is dispositive in an alter ego determination, and whether there was an attempt at concealment is merely an additional factor that one might consider. More importantly however, the assertion that there was no attempt to conceal in this case is also not true in multiple respects.

First, the fact that Patricia was made the owner of Callahan, despite being uninvolved in its operations and with no experience in the operations of Tri-Messine before that, can only be explained by the intent to create the false appearance of Callahan's being a separate entity from Tri-Messine. In addition, notwithstanding general discussions which Messina had previously had with the Union about the Con Ed situation, it is not disputed that Messina did not advise the Union of Callahan's creation or of its negotiations with Local 1010 until after Callahan had signed a CBA with Local 1010.[12] So, it is clear that indeed there was an attempt to conceal even the creation of the alter ego in this case. And Messina specifically withheld from the Union the plan to subcontract the entirety of Tri-Messine's operations to the new entity until immediately prior to its implementation.

Finally, Respondent argues essentially that there was no real harm done as a result of its actions because most of the Tri-Messine employees continued working for Callahan under what it maintains were substantially the same terms and conditions, and suggests that this outcome was actually more favorable to employees, who were able to continue working, than if Callahan had not been created.

I can find no case where the Board has held that an alleged lack of harm is a valid defense to an alter-ego allegation, and Respondent does not cite to any such precedent. Respondent cites only to a non-Board decision in which the First Circuit affirmed a District Court's granting of summary judgment finding

[12] It is not clear whether Messina ever disclosed his own initial attempts to negotiate with Local 1010 on behalf of Tri-Messine at all until the actual trial in this case.

that two companies were not alter egos, in part because the newly created company's employees were not being harmed by the continued operations of the previously existing company. *Massachusetts Carpenters Cent. Collection Agency v. A.A. Building Erectors, Inc*., 343 F.3d 18 (1d Cir. 2003). That decision is not binding precedent in this matter, and more importantly, the facts there are entirely at odds with the facts presented here, so I do not find the reasoning to be persuasive either.

In the present matter, the new entity is performing all of the work that the previously existing company had done. There was unquestionably harm done to those employees who were terminated by Tri-Messine because of their union affiliation and not immediately hired by Callahan. There was harm done to those employees who were never offered work by Callahan because they declined to change their Local 175 union affiliation. There was harm done to the Union funds that were deprived of their contracted-for contributions. And there was harm done to the collective bargaining process where the employees' duly-elected collective bargaining representative was summarily replaced at the behest of Respondents.

For the reasons described above, the facts here unmistakenly show that Tri-Messine and Callahan were and are alter egos, that the Local 175 bargaining agreement is valid and that it continues to apply to Callahan's bargaining unit employees.

F. The Complaint is not Time-Barred by Section 10(b).

The Consolidated Complaint in this case is based on two individual charges filed in Case 29–CA-194470 and Case No. 29–CA–206246. The charge in Case 29–CA–194470 was filed on March 7, 2017, and alleged that Respondents had violated Sections 8(a)(2), (3), and (5) of the Act, in part, by repudiating its CBA with the Union, discriminating in regard to the hire and tenure of employment to discourage membership in a labor organization, supporting another labor organization (Local 1010), and failing to bargain the effects of these actions with Local 175. The 8(a)(3) allegation of the charge was later withdrawn in April 2017.

That initial charge was later amended on September 14, 2017 to clarify the 8(a)(2) allegation of supporting another labor organization to include unlawfully recognizing Local 1010 and signing a CBA with them. On that same date, the charge in Case 29–CA–206246 was filed, re-alleging the unlawful 8(a)(3) termination of employees because of their support for and membership in Local 175, which was essentially the same allegation as had earlier been withdrawn.

Respondent raises the affirmative defense that the 8(a)(2) and (3) allegations in this matter should be time-barred by Section 10(b) of the Act because the amend charge in Case 29–CA–194470 and the initial charge in Case 29–CA–206246 were not filed until September 14, 2017, more than 6 months from the date the Union learned that Callahan had signed a contract with Local 1010 in mid-January 2017, and more than 6 months from the date Tri-Messine's employees were all terminated on March 3, 2017.

Section 10(b) of the Act states that "no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made." The 10(b) period begins to run when the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *United Kiser Services*, 355 NLRB 319 (2010). The Respondent bears the burden of proving this defense.

Significantly for this case, the Board holds that an otherwise untimely allegation which was first raised in a timely-filed charge, including one which had been dismissed or withdrawn, will be considered timely if it is closely related to the timely-filed charge. *Redd-I, Inc.*, 290 NLRB 115 (1988). This is true .

The *Redd-I* test for whether untimely allegations are "closely related" to a timely filed charge is a three-part test which analyzes: (1) whether the untimely allegations involve the same legal theory as the allegations in the timely charge; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the respondent would raise the same or similar defenses to both allegations.

The circumstances here unquestionably meet the *Redd-I* test. The allegations of the Complaint all involve the same theory that Tri-Messine created Callahan as an alter ego, then ceased its own operations and shifted the entirety of its work to the alter ego.[13] The allegations also clearly all arise out of the same sequence of events, and the respondent raises essentially the same defense to all of the allegations, namely that it was forced to take the actions it took because of the requirements of ConEd's contract.

As such, I find both the Union's 8(a)(2) and (3) allegations were timely filed, along with its 8(a)(5) and (1) allegations, and accordingly, I conclude that the complaint is not time-barred.

CONCLUSIONS OF LAW

1. Tri-Messine Asphalt Paving, Inc. and Callahan Paving, Corp. were and are alter egos of each other.

2. By failing and refusing to bargain collectively with the Union as the exclusive bargaining representative of its employees, Tri-Messine Asphalt Paving, Inc., has violated Section 8(a)(5) and (1) of the Act.

3. By failing and refusing to apply the Tri-Messine bargaining agreement that its alter ego, Tri-Messine Asphalt Paving, Inc. had and continues to have with the Union, Callahan Paving, Corp. violated Section 8(a)(5) and (1) and 8(d) of the Act.

4. By recognizing Local 1010 as the collective bargaining representative of its unit employees, while still bound by the agreement with Local 175, Callahan Paving, Corp. violated Section 8(a)(2) and (1) of the Act.

5. By terminating all of its employees on March 3, 2017, Tri-Messine has violated Section 8(a)(3) and (1) of the Act.

6. The above violations constitute unfair labor practices that affect commerce within the meaning of the Act.

REMEDY

Having found that Respondents have engaged in certain unfair

[13] It is not necessary that an untimely charge allege violations of the same Section of the Act as the timely charge, so long as the allegations are otherwise sufficiently related. The Board has found the *Redd-I* test to be satisfied where a timely 8(a)(5) allegation was sufficiently related to untimely allegations of both Sec. 8(a)(2) (*Whitewood Maintenance Co.*, 292 NLRB 1159, 1169 (1989)), and Sec. 8(a)(3) (*Bryant and Stratton*, 321 NLRB 1007, 1019 (1996)).

labor practices, I shall order them and their constituent entities to cease and desist therefrom and to take appropriate affirmative action designed to effectuate the policies of the Act.

Since Respondents have unlawfully failed to apply the terms and conditions of employment under the applicable bargaining agreement to its bargaining unit employees, it must make those employees whole for any loss of earnings or benefits, including, *inter alia*, making all delinquent contributions to the Union's benefit funds as provided for in the collective-bargaining agreement, including any additional amounts due the funds in accordance with *Merryweather Optical Co.,* 240 NLRB 1213, 1216 fn. 7(1979). Respondents shall also reimburse affected employees for any expenses resulting from the failure to make contributions to the benefit funds, as set forth in *Kraft Heating & Plumbing*, 252 NLRB 891, n. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981).[15]

Such amounts shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owe the fund.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[16]

ORDER

The Respondents, Tri-Messine Asphalt Paving, Inc. and Callahan Paving, Corp., and each of them, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to apply the terms of the collective-bargaining agreement that Respondents entered into with Construction Council 175, Utility Workers Union of America, AFL–CIO (the Union) and failing and refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of their bargaining unit employees.

(b) Recognizing Local 1010 as the collective-bargaining representative of their bargaining unit employees.

(c) Discharging or otherwise discriminating against any employee for engaging in activity protected by Section 7 of the Act.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Honor and abide by the terms and conditions of their collective-bargaining agreement with the Union and make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of the unfair labor practices found in this decision, in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of the Board's Order, offer all affected employees full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make all affected employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Compensate all affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(e) Make whole their employees for any expenses ensuing from the Respondents' failure to make required contributions to the Union's benefit funds and make whole the Union's benefit funds for losses suffered, in the manner set forth in the remedy section of this decision.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date such awards are fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of monies due under the terms of this Order.

(h) Within 14 days after service by the Region, post at all of its facilities, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced or covered by other material. If the Respondents have gone out of business, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all employees and former employees employed by

[15] In the event that lump sum payments are required to be made to employees under this remedy, those payments must be made in accordance with the requirements set forth in *AdvoServ of New Jersey, Inc*., 363 NLRB No. 143 (2016).

[16] If no exceptions are filed as provided in Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Board's Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.

Respondents at any time since March 7, 2017.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. December 17, 2018

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Construction Council 175, Utility Workers Union of America (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit by refusing to apply the terms and conditions of our collective-bargaining agreement, including wage rates and benefit fund contributions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL honor and abide by the terms of our collective-bargaining agreement with the Union, and WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits suffered as a result of our refusal to apply the collective-bargaining agreement to all unit employees, plus interest.

WE WILL, within 14 days from the date of this Order, offer affected employees full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make all affected employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL make all delinquent payments to the Union's benefit funds and WE WILL make you whole for any expenses ensuing from our failure to make such payments, including any additional amounts due to the funds on your behalf, with interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating backpay awards to the appropriate calendar years for each employee.

TRI-MESSINE ASPHALT PAVING, INC. AND ITS ALTER EGO CALLAHAN PAVING, CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-194470 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.